Lucy Wong Nyuk King (F) & Anor v Hwang Mee Hiong (F)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-02(IM)-1127–06 OF 2017
UMI KALTHUM, ABDUL KARIM AND STEPHEN CHUNG JJCA
3 FEBRUARY 2020

Civil Procedure — Damages — Notice of assessment of damages — High Court set aside notice of assessment of damages — Court of Appeal reinstated notice of assessment of damages for hearing — High Court struck off notice of assessment of damages based on preliminary objection by respondent — Whether High Court had jurisdiction to struck off notice of assessment of damages which initially had been reinstated by Court of Appeal — Whether assessment of damages before High Court was similar with assessment of damages before senior assistant registrar — Whether O 37 of the Rules of Court 2012 relevant or applicable to assessment of damages by High Court judge — Rules of Court 2012 O 37

The appellants' application for removal of private caveat was dismissed by the High Court but the decision was reversed by the Court of Appeal ('the COA'). The appellants subsequently filed notice of assessment of damages ('encl 68') whereas the respondent had applied via encl 69 to set aside encl 68. The High Court had allowed encl 69 but on appeal, the COA had reinstated encl 68 for hearing. During the hearing before the learned judicial commissioner ('the JC'), the respondent had raised a preliminary objection that the appellants had not complied with O 37 of the Rules of Court 2012 ('the ROC'). The JC agreed with the preliminary objection and struck off encl 68 with costs of RM800, hence, the present appeal. The issue to be determined was whether an assessment before the High Court judge was the same as an assessment before the senior assistant registrar ('SAR') or whether O 37 of the ROC was relevant/applicable to an assessment by the High Court judge.

Held, allowing the appeal with costs of RM3,000, setting aside order of High Court and remitting back encl 68 to the High Court for hearing:

(1) At the first place, the COA had allowed the appellants' appeal against the setting aside of encl 68 and as a result of allowing the appeal, the COA had in effect reinstated encl 68. Therefore, the learned JC was required to hear fully encl 68 and should not have entertained further preliminary objections raised by the respondent. However, the learned JC continued to hear the respondent's preliminary objection and allowed it and thus encl 68 was struck out. By doing this, the learned JC had overruled/ignored/countermanded the COA's decision when he had no

jurisdiction to do so. For this reason alone, the court was of the view that the appellants' appeal must be allowed (see para 22).

(2) There was a difference between a High Court judge and the registrar/SAR. Order 37 of the ROC provided for the assessment of damages before the registrar. However, the learned JC resorted to the definition of 'Judge' in the ROC to come to the conclusion that if a 'Judge' included a 'Registrar', then wherever the reference to a 'Registrar' in the ROC must also mean it referred to a judge/JC of the High Court. This interpretation of O 37 was fallacious. Order 37 of the ROC generally did not apply to the appellants' case, even though they had filed an application in encl 68 before the learned SAR. As O 37 generally did not apply to the appellants' case, the appellants were at liberty to pursue the same application in encl 68 before the learned JC (see paras 23–24).

[Bahasa Malaysia summary

Permohonan perayu untuk pembatalan kaveat persendirian telah ditolak oleh Mahkamah Tinggi tetapi keputusan tersebut telah diubah oleh Mahkamah Rayuan ('MR'). Perayu-perayu kemudian telah memfailkan notis penilaian gantirugi ('lampiran 68') manakala responden telah memohon melalui lampiran 69 untuk mengenepikan lampiran 68. Mahkamah Tinggi membenarkan lampiran 69 tetapi di atas rayuan, MR telah menguatkuasakan semula lampiran 68 untuk pendengaran. Semasa pendengaran di hadapan pesuruhjaya kehakiman yang bijaksana ('PK'), responden telah membangkitkan bantahan awal bahawa perayu tidak mematuhi A 37 Kaedah-Kaedah Mahkamah 2012 ('KKM'). Pesuruhjaya kehakiman bersetuju dengan bantahan awal dan membatalkan lampiran 68 dengan kos sebanyak RM800, oleh itu, rayuan semasa. Isu yang perlu ditentukan adalah sama ada penilaian di hadapan hakim Mahkamah Tinggi adalah sama seperti penilaian di hadapan penolong kanan pendaftar ('PKP') atau sama ada A 37 KKM adalah relevan/terpakai terhadap penilaian oleh hakim Mahkamah Tinggi.

Diputuskan, membenarkan rayuan dengan kos RM3,000, mengenepikan perintah Mahkamah Tinggi dan mengembalikan lampiran 68 kepada Mahkamah Tinggi untuk pendengaran:

(1) Pada mulanya, MR telah membenarkan rayuan perayu terhadap pengenepian lampiran 68 dan sebagai akibat daripada membenarkan rayuan, MR hakikatnya telah menguatkuasakan semula lampiran 68. Oleh itu, PK yang bijaksana dikehendaki mendengar sepenuhnya lampiran 68 dan tidak seharusnya mendengar bantahan awal yang dibangkitkan oleh responden. Walau bagaimanapun, PK yang bijaksana terus mendengar bantahan awal responden dan membenarkannya dan dengan itu lampiran 68 dibatalkan. Melalui tindakan tersebut, PK yang bijaksana telah mengatasi/mengabaikan/menafikan keputusan MR sedangkan PK tidak mempunyai bidang kuasa untuk berbuat demikian.

Atas sebab ini sahaja, mahkamah berpendapat bahawa rayuan perayu harus dibenarkan (lihat perenggan 22).

(2) Terdapat perbezaan di antara hakim Mahkamah Tinggi dan pendaftar/PKP. Aturan 37 KKM memperuntukkan berkenaan penilaian ganti rugi di hadapan pendaftar. Walau bagaimanapun, PK yang bijaksana menggunakan definisi 'Hakim' di dalam KKM untuk membuat kesimpulan bahawa jika seorang 'Hakim' termasuk 'Pendaftar', maka di mana pun sebutan mengenai 'Pendaftar' di dalam KKM mesti juga merujuk kepada hakim/PK Mahkamah Tinggi. Tafsiran A 37 ini tidak masuk akal. Aturan 37 KKM secara amnya tidak terpakai bagi kes perayu-perayu, walaupun mereka telah memfailkan permohonan dalam lampiran 68 di hadapan PKP yang bijaksana. Memandangkan A 37 secara amnya tidak terpakai kepada kes perayu, perayu bebas untuk meneruskan permohonan yang sama dalam lampiran 68 di hadapan PK yang bijaksana (lihat perenggan 23–24).]

Cases referred to

Tetuan Sri Ling & Associates v Lian Meng Wah [2015] 3 CLJ 63, CA (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 3, 17
Rules of Court 2012 O 1 r 4, 4(1), (2), O 2 rr 2, 3, O 32, O 32 r 9, O 37, O 37 r 1(1), (6)
Sarawak Land Code (Cap 81) s 177

Tai Choi Yu (Tai Choi Yu) for the appellants.
Henry Ling from (Ling & Wong Advocates) for the respondent.

Umi Kalthum JCA:

HISTORY AND FACTS OF THE CASE

[1] In order to understand fully the issues raised at hand in this appeal by the appellants/plaintiffs, the historical background of the matter needs to be appreciated. For ease of reference we will refer the parties as they were in the High Court.

[2] Towards this end, we have taken the liberty to refer to the plaintiff's counsel's submission which had laid out the historical background and facts of the case.

[3] On 1 March 2010, the plaintiffs filed an Originating Summons No 24–11 of 2010 ('OS') for the removal of a private caveat lodged by the defendant on the plaintiffs' land and for compensation and damages under

s 177 of the Sarawak Land Code ('the SLC').

[4] On 16 August 2010, the learned High Court judge dismissed the OS with costs to be taxed unless agreed. The plaintiffs appealed against that decision vide Civil Appeal No Q-02–2618 of 2010.

[5] On 12 April 2013, this court heard that Civil Appeal No Q-02–2618 of 2010 and allowed the plaintiffs' appeal with costs of RM20,000 (see order at pp 27–28, record of appeal) ('COA order').

[6] After the COA order was granted, the plaintiff applied for the assessment of damages vide notice of appointment of assessment of damages in encl 68 (notice of assessment of damages, see p 29, record of appeal) on 21 August 2013.

[7] The defendant objected to the notice of assessment of damages and applied vide encl 69 to set it aside.

[8] The learned High Court judge allowed the defendant's application in encl 69 and had set aside encl 68.

[9] The plaintiffs appealed to this court against the order of the High Court setting aside encl 68 vide Court of Appeal Civil Appeal No Q-02(IM)-701–04 of 2015.

[10] On 16 February 2017, this court allowed the plaintiffs' appeal against the setting aside of encl 68 and reinstated encl 68 for hearing.

[11] After encl 68 was reinstated for hearing, the plaintiffs appeared before the High Court at Bintulu on 11 April 2017 where the matter was brought up before the senior assistant registrar ('SAR'), Tuan Muhammad Hafiz bin Mohd Nor, who apologised to the parties and said as follows:

> Upon instruction from YAA CJSS, all assessment of damages to be heard by high court judges and the instruction is to take effect immediately and it includes all pending cases.

[12] On 28 April 2017, encl 68 was set for hearing before the learned judicial commissioner ('JC'). Once again the defendant raised preliminary objection to encl 68 on the ground that the plaintiffs had not complied with the provisions of O 37 of the Rules of Court 2012 ('the ROC'). The learned JC allowed the defendant's preliminary objection and proceeded to strike off encl 68 with costs of RM800 (see draft order 28 April 2017, pp 20–21, agreed record). Hence this appeal before us by the plaintiffs.

AT THE HIGH COURT

[13] As stated earlier, when encl 68 was set for hearing before the learned JC, the defendant had raised preliminary objection to that enclosure. But on the date of hearing of encl 68, the learned plaintiffs' counsel had raised preliminary objection to the defendant's preliminary objection by reason of the defendant's preliminary objection was not permissible under O 2 rr 2 and 3 of the ROC. The plaintiffs further submitted that as the COA order had ordered damages to be 'assessed by the court or by the deputy registrar or the senior assistant registrar', O 37 of the ROC did not apply. This was because O 37 only relates to matters before the registrar and not before a judge.

[14] Other than stating that the plaintiffs had not complied with the provisions of O 37, learned counsel for the defendant submitted that O 2 r 2 of the ROC only applies to cases where the complaint of irregularity is based on the evidence of alleged non-compliance. The defendant was not raising preliminary objection on that point. Further, O 2 r 3 of the ROC does not prohibit all preliminary objections.

[15] Having heard the parties the learned JC found that the plaintiffs' preliminary objection had no basis as O 2 r 2 of the ROC did not apply to the preliminary objection raised by the defendant. That the defendant's objection pertained to the non-compliance of a mandatory provision of the ROC, that is, O 37. In any event, O 2 r 2 pertains to application to set aside for irregularity. As for O 2 r 3, the learned JC was of the view that it does not prohibit preliminary objections outright; the court still has to consider the grounds of objections before deciding whether to allow it or not. Further, O 2 r 3 does not require a notice of application to be filed first before an objection could be entertained. The learned JC therefore found no merits in the plaintiff's objections and dismissed it.

[16] The learned JC then proceeded to consider the defendant's preliminary objection. It would appear that learned counsel for the plaintiffs raised the same issues as he did in the plaintiffs' preliminary objection against the defendant's preliminary objection. To this end, the learned JC referred to this court's decision in *Tetuan Sri Ling & Associates v Lian Meng Wah* [2015] 3 CLJ 63 and quoted the following passage:

> [52] Having considered the circumstances leading to the order made by the learned judge in respect of encl 48, it would seem clear that there is serious non-compliance with O 37 on the part of LMW as regards the procedure that is required to be followed relating to assessment of damages. There was indeed no explanation proferred by LMW on the non-compliance with the law and the long delay of almost three years to file the notice of appointment for assessment of damages. In our judgement, the learned judge clearly had erred when she proceeded to assess the

damages and decided that the quantum was sufficiently proven relying only on the affidavit of LMW especially when no directions had been given by the learned SAR as required under O 37 r 1(1) of the Rules of Court 2012.

The learned JC then concluded that it was clear from the above quotation, O 37 of the ROC also applies to a judge or JC. The learned JC then stated as follows:

> [24] The fact that the assessment of damages herein was before a judge or judicial commissioner did not mean that the requirements in O 37 ROC could be dispensed with. The procedure relating to assessment of damages must be complied. Failure to do so tantamount to a serious non-compliance.
>
> [25] Further, the definition of a 'judge' in O 1 r 4 ROC states that:
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> > 'judge' means a Judge or Judicial Commissioner of the High Court and includes where he is empowered to act, a Judge of the Sessions Court, a Magistrate or a Registrar, as the case may be.
>
> [26] In other words, a Judge or a Judicial Commissioner may act as a Registrar under O 37 ROC.
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> [27] That said, the question that needed to be answered was, whether the Plaintiffs had complied with the mandatory requirements of O 37 ROC before filing encl 68.
>
> [28] The answer to that question was in the negative.

[17] Based on the decision of this court in *Tetuan Sri Ling & Associates*, the learned JC found that since the plaintiffs had failed to comply with O 37 r 1(1) and 1(6) of the ROC, it followed that encl 68 filed by the plaintiff was defective and incompetent before him for non-compliance, in that no directions were given pursuant to O 37 r 1(1) of the ROC. The learned JC therefore allowed the preliminary objection by the defendant and proceeded to strike out encl 68 with costs to the defendant.

THE APPEAL

[18] At the outset of the hearing of this appeal, the defendant raised a preliminary objection on the fact that the first plaintiff is an undischarged bankrupt and therefore this appeal was incompetent and this court had no jurisdiction to hear the appeal. Upon learned counsel for the plaintiffs producing to this court a copy of a letter from the Insolvency Department, Miri Branch reference number BP013801/2016 dated 16 October 2018 stating that the Director General of Insolvency had given his sanction to the first plaintiff to 'memulakan atau meneruskan tindakan di Mahkamah Rayuan Persekutuan Malaysia bagi tindakan di Mahkamah Rayuan Persekutuan Malaysia bagi Guaman No Q-02(IM)-1127–06/2017 serta melantik Tetuan Tai Choi Yu & Co, Advocates untuk mewakili tuan dalam tindakan guaman dan

rayuan-rayuan yang berbangkit daripada kes ini ...', learned counsel for the defendant withdrew his preliminary objection and this court proceeded with the plaintiff's appeal.

Issue

[19] Even though the plaintiffs raised five issues in their memorandum of appeal, learned counsel for them in a nutshell stated that the issue to be determined by us was whether an assessment before the High Court judge is the same as an assessment before the SAR or whether O 37 of the ROC is relevant/applicable to an assessment by the High Court judge.

[20] Since the plaintiffs' appeal centred around the provisions of O 37 of the ROC, for ease of reference the relevant parts of that order is reproduced below:

ORDER 37

ASSESSMENT OF DAMAGES

1 Assessment of damages by Registrar (O 37 r 1)

(1) Where judgment is given for damages to be assessed and no provision is made by the judgment as to how they are to be assessed, the damages shall, subject to the provisions of this Order, be assessed by the Registrar, and the party entitled to the benefit of the judgment shall, within one month from the date of the judgment, apply to the Registrar for directions and the provisions of Order 34 shall, with the necessary modifications, apply.

(2) On the hearing of the application for directions, the Registrar may, in addition to making such orders as are necessary and appropriate under Order 34, give directions as to time by which a notice of appointment for assessment of damages shall be filed and such notice upon being filed shall, notwithstanding anything in Order 62, rule 10, be served not later than seven days thereafter on the party against whom the judgment is given. Notice of appointment for assessment of damages shall be in Form 62A.

(3) If the party entitled to the benefit of the judgment fails to comply with paragraph (1), the Court may, on the application of the party against whom the judgment is given, proceed to assess damages or make such other order as it thinks just.

(4) The attendance of witnesses and the production of documents before the Registrar in proceedings under this Order may be compelled by subpoena, and the provisions of Order 35 shall, with the necessary adaptations, apply in relation to those proceedings as they apply in relation to proceedings at the trial.

(5) Subject to any direction given by the Registrar pursuant to this rule, the party entitled to the benefit of the judgment shall file a notice of appointment for assessment of damages within six month of the date of judgment.

(6) A party shall not file a notice of appointment for assessment of damages by the Registrar pursuant to this rule unless directions for filing the exchange of affidavit evidence pursuant to Order 34 have been given or complied with, as the case may be.

(7) If that party does not file the notice of appointment for assessment of damages within the prescribed period, any other party may apply for directions.

2 Certificate of amount of damages (O 37 r 2)

Where in pursuance of this Order or otherwise damages are assessed by the Registrar, he shall certify the amount of the damages.

...

4 Power to order assessment by Registrar or at trial (O 37 r 4)

The Court may, in the case of any such judgment as is mentioned in rule 1, order either —

(a) that the assessment of the damages shall be made by the Registrar; or

(b) that the action shall proceed to *trial before a Judge in*

respect of the damages and where the Court orders that the action shall proceed to trial, Order 34 shall apply with the necessary modifications.

... (Emphasis added.)

[21] Essentially both the plaintiffs and the defendant had raised the same arguments before the learned JC as before us and we will not repeat them here. Suffice for us to address the issue/issues raised before us and to give our reasons as to why we had unanimously decided to allow the plaintiffs' appeal.

[22] In the first place, it must remembered that on 16 February 2017, this court had allowed the plaintiffs' appeal against the setting aside of encl 68 (applied for by the defendant in encl 69 and allowed by the learned High Court judge) and as a result of allowing the appeal, this court had in effect reinstated encl 68. What this means is that the learned JC is required to hear fully encl 68 and should not have entertained further preliminary objections raised by the Defendant. However, the learned JC continued to hear the defendant's preliminary objection and allowed it and thus encl 68 was struck out. To us, and with respect, the learned JC had overruled/ignored/countermanded this court's decision dated 16 February 2017 when he had no jurisdiction to do so. For this reason alone we were of the view that the plaintiff's appeal must be allowed.

[23] We further agreed with the plaintiffs' counsel's contention that there is a difference between a High Court judge and the registrar/SAR. Order 37 of the ROC provides for the assessment of damages before the Registrar. However, the learned JC resorted to the definition of 'Judge' in the ROC to

come to the conclusion that if a 'Judge' includes a 'Registrar', then wherever the reference to a 'Registrar' in the ROC must also mean it refers to a judge/JC of the High Court. With respect, we found this interpretation of O 37 to be fallacious for the following reasons:

(a) O 37 does not provide a different meaning to the term 'Registrar' to include a judge of the High Court. Therefore, resort must be made to the general definition provision as provided in O 1 r 4 to that term 'Registrar';

(b) under O 1 r 4(1), 'Registrar' has been defined as follows:

> 'Registrar' means —
>
> (a) the Chief Registrar or the Deputy Chief Registrar of the Federal Court;
>
> (b) the Registrar of the High Court of Malaya or the Registrar of the High Court of Sabah and Sarawak;
>
> (c) any Deputy Registrar or Senior Assistant Registrar of the High Court; or
>
> (d) any Registrar of the Subordinate Court under the Subordinate Courts Act 1948;

It can therefore be clearly seen that the SAR is included in the term 'Registrar', but definitely does not include the High Court judge/JC;

(c) the distinction between the terms used in O 37 to mean the 'Registrar' and the 'Judge' can also be clearly seen in O 37 r 4(b) as against the r 4(a) where a reference is made first of all in r 4(a) to 'that the assessment of the damages shall be made by the Registrar; or', and r 4(b) makes reference to 'that the action shall proceed to trial before a Judge in respect of the damages, ...'. If the term 'Registrar' is to include a 'Judge', this distinction would not be required at all in r 4;

(d) the COA Order (dated 12 April 2013) moreover had ordered damages to be 'assessed by the Court or by the Deputy Registrar or the Senior Assistant Registrar'; this can only mean that this court had ordered the assessment of damages to be tried before a judge/JC of the High Court as one of the possibilities — see definition of 'Court' in O 1 r 4(2) of the ROC which states as follows:

> (2) In these Rules, unless the context otherwise requires, 'Court' refers to the Magistrate's Court, or any one or more Magistrate thereof, the Sessions Court, or any one or more Judges thereof, *the High Court or any one or more Judges or Judicial Commissioners thereof*, whether sitting in Court or in Chambers; but the foregoing provision shall not be taken as affecting any provision of these Rules and, in particular, Order 32 rule 9, by virtue of which the authority and jurisdiction of the Registrar of the Court is defined and regulated';

(e) flowing from sub-para 23(d) above, it cannot be said that there was no provision made by the judgment as to how the assessment of damages is to be assessed so as to enable the provisions of O 37, in particular r 1(1), to apply;

(f) we noted the provisions of O 32 r 9 of the ROC, which provides as follows:

> 9 Jurisdiction of Registrar (O 32 r 9)
>
> The Registrar shall have power to transact all such business and exercise all such authority and jurisdiction as under the Act of these Rules *may be transacted and exercised by a Judge in Chambers except such business, authority and jurisdiction as the Chief Judge may from time to time direct to be transacted or exercised by a Judge in person* or as may by any of these Rules be expressly directed to be transacted or exercised by a Judge in person. (Emphasis added.)

Order 32 is headed 'Applications and Proceedings in Chambers'. The term 'Chief Judge' referred in r 9 thereof had been defined in s 3 of the Courts of Judicature Act 1964 (Act 91) ('the CJA') (the definition of 'Chief Judge' in the CJA applies since the ROC is made pursuant to s 17 of the CJA) to mean:

> 'Chief Judge' means the Chief Judge of the High Court in Malaya or of the High Court in Sabah and Sarawak, as the case may require;

Moreover, in view of the Chief Judge of Sabah and Sarawak's instruction to the learned SAR (which has been alluded to in para 11 above), encl 68 has to be heard before the learned JC in person;

(g) the learned JC relied heavily on the decision of this court in *Tetuan Sri Ling & Associates* (supra) to conclude that O 37 applies to a judge or JC. With respect, the learned JC failed to take into account the difference in the facts in *Tetuan Sri Ling & Associates* as against the case before us. In the former, the judgment in default order (which was in favour of the respondent/LMW) required the appellant to pay the respondent damages *to be assessed by the deputy registrar*. By the definition of 'Registrar', it would also include the Deputy Registrar for the purposes of O 37. Therefore, the judgment of this court in that case was consonant with our interpretation of O 37 as laid out by us in the sub-paras before this. The facts of the case before us are therefore distinguished from that case; and

(h) in view of sub-paras 23(a)–(g) above, we found that O 37 generally does not apply to the plaintiffs' case, even though they had filed an application in encl 68 before the learned SAR.

[24] As O 37 generally does not apply to the plaintiff's case, the plaintiffs are at liberty to pursue the same application in encl 68 before the learned JC, and by virtue of O 37 r 4 it is provided that 'where the Court orders that the action shall proceed to trial, Order 34 (pre-trial case management) shall apply with the necessary modifications'.

CONCLUSION

[25] In conclusion, for the reasons stated above, we answered the issue posed by the plaintiffs in the negative. We therefore unanimously allowed the plaintiffs'/appellants' appeal with costs of RM3,000 subject to the payment of allocatur fees. We set aside the High Court order dated 28 April 2017. We consequentially ordered encl 68 to be remitted back to the High Court for hearing before the learned JC/judge.

Appeal allowed with costs of RM3,000; order of High Court set aside; case remitted back to High Court for hearing.

Reported by Dzulqarnain Ab Fatar